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THE GRANVILLE ESTATE AND NORTH CAROLINA

Governor Vance, in his Sketches of North Carolina, says:

"In the leafy month of June, 1666, that merry monarch and somewhat dissolute man, Charles the Second, by the grace of God, of Great Britain, France and Ireland, King, Defender of the Faith, *etc., etc.,* was graciously pleased to grant unto his 'right trusty and well beloved cousin and counsellor Edward, Earl of Clarendon, our high Chancellor of England; our right trusty and entirely beloved cousin and counsellor George, Duke of Albemarle, Master of our horse'; and, with like expressions of courtesy and insincere regard, to the Earl of Craven, Lord Berkley, Lord Ashley Cooper, Sir George Carterett, Sir John Colleton and Sir William Berkley, the most magnificent domain ever conferred by a Sovereign upon subjects in modern times, or perhaps in all time. Little did Charles know what he was doing, or did these subjects know what they were receiving."

Bancroft says of these objects of royal generosity:

"The historian Clarendon, the covetous though experienced minister, hated by the people, faithful only to the King; Monk, so conspicuous in the restoration, and now ennobled as the Duke of Albemarle; Lord Craven, a brave cavalier and old soldier of the German discipline, supposed to be husband to the Queen of Bohemia; Lord Ashley Cooper, afterward Earl of Shaftsbury, Sir John Colleton, a royalist of no historical notoriety; Lord John Berkley, with his younger brother, Sir William Berkley, the Governor of Virginia, and the passionate, ignorant and not too honest, Sir George Carterett—were con-

> stituted proprietors and immediate sovereigns of the Province of Carolina, reaching from the Atlantic Ocean to the 'South Seas,' and from the 29th to the 36th Degrees of Northern Latitude."

The grantees were to hold of the King and his successors "in free socage, as part of the manor of East Greenwich in Kent, with as ample immunities as are possessed by the Bishops of Durham in England, yielding and paying a yearly rent of twenty marks and one-fourth of all gold and silver ore found within the said Province." They were "constituted by their charters, the true and absolute Lords and Proprietors of the before described Province, with power to divide the Province into Counties and Baronies. By the assent of the Freemen thereof, to ordain and publish laws for the Government of the whole, or the respective parts, and to enforce their laws by the infliction of penalties, even capital, if necessary, to relieve and pardon offences—constitute Ports at which alone vessels should be laden and unladen . . ., to alien the lands granted or any part thereof, to be holden of themselves, notwithstanding the statute of *Quia Emptores,* to confer titles of honor so as they be not the same with those conferred by the King of England—and power to set up and maintain a government in the said Province." Pursuant to the powers conferred by this grant, or charter, the Lords Proprietors established a government and many colonists came and settled within its boundaries. John Locke, at the request of Shaftsbury, prepared for the government of "the dawning States," a perfect constitution, worthy to endure throughout all ages, known as "The Fundamental Constitutions of Carolina," or "Locke's Grand Model." The effort to put into effect this elaborate scheme of government, in the forests of Carolina, proved a failure and was soon abandoned. All of the Lords Proprietors, or their assigns, except Lord John Carterett, who had succeeded to the title of Sir George, who died 1696, on the fifth day of July, 1729, conveyed to the King all of their rights, titles and estates, royalties, franchises, privileges and immunities in and to the lands covered by the grant. Thereafter, Carteret filed his petition to have one-eighth part allotted

to him in severalty. Pursuant to an act of Parliament, Commissioners were appointed to make partition and a line was established by which one-eighth part of said land, being that portion thereof lying south of the line separating North Carolina and Virginia, west of the Atlantic Ocean, and north of "a cedar stake set upon the sea side in the latitude of thirty-five degrees and thirty-four minutes north latitude, and from that stake by a west line as far as the bounds of the Charter granted to the Lords Proprietors of Carolina by his Majesty King Charles Second" was set apart to him. This report was duly confirmed and, pursuant thereto, Lord Carteret executed a deed releasing to the King "all his estate, right, title and interest of, in and to the government of said Province of Carolina and to said seven-eighth parts divided from the said one-eighth part, so allotted to the said John, Lord Carterett.

His Majesty, George II, on September 17, 1744, gave, granted and assigned to Lord Carterett, the one-eighth part of said land with all quit rents, *etc.*, due on account thereof. After the execution of the deed of 1729, the Colony was governed by the King through royal Governors appointed by him. The laws were made by the Assembly and Council, subject to the approval of the King. Lord Carterett, who became Earl Granville, appointed agents and opened offices for entry and grant to individuals of the lands allotted to him. Friction arose between the people and Granville's agents, resulting in a number of acts of the Assembly, much disturbance and, sometimes, violence in the Colony.

The delegates elected to the Provincial Congress held at Halifax on November 18, 1776, for "the particular purpose of framing a Constitution," adopted a "Declaration of Rights," the twenty-fifth section of which declared that:

> "The property in the soil, in a free government, being one of the essential rights of the collective body of the people, it is necessary, in order to avoid future disputes, that the limits of the State should be ascertained with precision. . . . All the territory, seas, waters, harbors with their appurtenances, lying between the lines above described (Virginia and South Carolina) are the right and property of the people of the State to be

held by them in Sovereignty. . . . *Provided further,* that nothing herein contained shall affect the titles or possession of individuals holding, or claiming, under the laws heretofore in force, or grants heretofore made by the late King George II, or his predecessors, or the late Lords Proprietors, or any of them."

At this time the lands within the boundaries of the State were included in one of the following classes:

(1) The land, within the boundary of the grant by the Lords Proprietors to the King, July 5, 1729, being all of the lands covered by the original grant, except that portion set apart and granted to Lord Carterett.

(2) The land allotted and granted to Lord Carterett by the King, September 17, 1744.

The exceptions within these two classes comprised:

(1) Lands for which the Lords Proprietors had issued grants to individuals prior to July 5, 1729.

(2) Lands for which the King had issued grants to individuals subsequent thereto and prior to July 4, 1776.

(3) Land for which Earl Granville had issued grants prior to July 4, 1776, estimated to be three hundred thousand acres, reserving quit rents of sixty thousand pounds sterling.

That the title to the lands held by the King, on July 4, 1776, vested in the people when they renounced allegiance to the Crown and established a new and independent political sovereignty followed by the successful Revolution, was never drawn into controversy, nor was any question raised in regard to the title to lands held by individuals who came within the proviso to the twenty-fifth section of the Declaration of Rights. The great controversy which arose, after the Revolution, related to the lands owned by Earl Granville. To have a clear understanding of the interesting questions involved in this controversy, it is necessary to note, in addition to the Declaration of Rights, the legislation enacted by the General Assembly of North Carolina, in regard to confiscations, entries and grants, the provisions of the Treaty of 1783 between the United States and Great Britain, and the status of individuals holding grants under the several sources named. A number of such individuals were

residents of England on July 4, 1776, and remained loyal subjects of the King. Among these were the heirs and devisees of Earl Granville who died February 12, 1776. Others, upon the separation of the Colony, and the organization of the new State, left America and went either to England, or some of her Colonies—remaining loyal to the King. They constituted the Loyalists of those days. A number of persons residing in and who became citizens of other American States, held grants for land within this State.

At the November Session, 1777, the legislature enacted a Confiscation Act, declaring that:

> "All lands to which any person had title on July 4, 1776, and who, on that day, was absent from the United States, and still is absent, or hath attached himself to the enemy, or since that day hath removed from the United States and remains absent, shall be and are confiscated unless, at the first Assembly to be held after the first of October, 1778, he shall appear and become a citizen."

No other persons were named and no provision was made, in this act, for seizing or selling any of the lands declared to be confiscated.

At the January Session, 1779, an act was passed reciting that the penalties of the Act of 1777 had been incurred, and that the lands of all such persons as came within the provisions of the act "are forfeited to the State." This act provides for the appointment of commissioners to take possession of the confiscated lands, to examine persons on oath, to discover such lands, to register their proceedings and make report thereof to the County Court. No persons are named as coming within its provisions.

At the October Session of the same year, another act was passed in which a number of persons, not including Earl Granville, were named, whose lands, as well as those who came under the penalties of the first act, were declared to be confiscated. Commissioners were named with authority to sell the confiscated lands.

At the Session of 1782 an act was passed in which a large number of persons, whose lands are declared to be confiscated,

are named, not including Earl Granville. The lands of these persons are directed to be sold by seven Commissioners named in the act. By the third section of this act it is recited that the property of sundry other persons have been seized by the Commissioners as confiscated under former acts and "some differences have arisen, or may arise, respecting the legal forfeiture of the same." The Commissioners are directed to give notice to all persons who may claim the same to appear and show cause, *etc.* No other confiscation acts were enacted prior to the Treaty of 1783. At the Session of November, 1777, the legislature enacted a statute opening to entry, "all of the lands which have not been granted by the Crown of Great Britain, or the Lords Proprietors of Carolina, or any of them, in fee before the fourth day of July, 1776, or which have accrued or shall accrue to the State by Treaty of Conquest." The only reference in this act to the Granville lands is found in the fifteenth section, which secures to persons "who, in the office of the late Earl Granville . . . have heretofore made an entry or entries or who, since the death of the said Earl Granville, hath possessed and actually improved any vacant and unappropriated land, *etc.*" priority in taking out a grant therefor. Other entry laws were passed prior to the Treaty of 1783, in none of which is any other specific provision made relating to the Granville lands. Among many others, General William R. Davie, Nathaniel Allen, grandfather of the late Allen G. Thurman of Ohio, and Josiah Collins, made entry, November, 1788, upon, and procured, grants from the State, for large and valuable tracts, within the boundaries of the Granville lands. The first public record in which it appears that the heirs of Granville made claim to the land, after the Revolution, is a letter sent by Governor Martin, April 22, 1784, to the General Assembly "from one of our delegates covering sundry papers presented to the Ministers of the United States, at Paris, to wit, one without a signature, stating the title which the heir of the late Earl Granville sets up to a certain territory in this State." It does not appear from the legislative journals that the General Assembly took any notice of "the papers."

Nothing further is found upon the public records of the State, relating, specifically, to the claim of the Granville heirs until 1801, when two actions of ejectment were brought by George William, Earl Coventry, successor, by devise, to the title of Earl Granville against Nathaniel Allen and Josiah Collins—and against William R. Davie. The correspondence between John London, Esq., of Wilmington, N. C., agent for the Granville claimants, and William Gaston, beginning in 1801, and continuing until January 4, 1808, together with other papers in the possession of the North Carolina Historical Commission, presents an interesting history of what Governor Swain says was "a case involving most intricate legal questions, and the title to property of greater value than any other ever litigated before an American tribunal." The plaintiffs were represented by William Gaston, Esq., later Associate Justice of the Supreme Court, and Edward Harris, Esq. The defendants, by M. Woods, Esq., a lawyer of eminent learning, and Judge Duncan Cameron, to whom Governor Swain says, "great honors and emoluments were well and justly awarded," and the former Attorney General, Blake Baker, Esq. Only such reference is made to the history of the Granville lands as are deemed necessary to present the interesting, and in many respects, novel questions which arose upon the record.[1]

By depositions taken in England, the chain of title, beginning with the original grant to the Lords Proprietors, the grant by King George II to Carterett for the one-eighth part allotted to him in the partition of 1744, the will under which plaintiff claimed, *etc.*, was clearly established. The case came on for trial before the Circuit Court at Raleigh, Chief Justice Marshall presiding, with District Judge Potter, at June Term, 1805. The record shows that the Chief Justice took no part, "utterly declining to give any opinion thereon." Governor Swain says:

> "Marshall, Chief Justice, from personal consideration, peremptorily declining to sit upon the trial."

[1] A history of "The Granville District" may be found in "The James Sprunt Historical Publications." Vol. 13, No. 1, Coulter.

Upon the conclusion of the evidence, Mr. Gaston moved for judgment as upon a demurrer to defendant's evidence. Thus, the argument presented clearly the questions of law in the case at bar, involving only a small body of land, but in their larger application, involving the title to two-thirds of the State, thirteen of the largest and most populous counties and extending westwardly to the "South Seas," with the exception of those portions granted to individuals by Granville prior to July 4, 1776. The carefully prepared brief of Gaston, with its divisions and subdivisions of "points," "objections" and citations from Vattell, Rutherford, Blackstone, English and American decisions, together with his "Argument" and the "Argument" of Judge Cameron, enable us to see with what thorough and careful preparation these lawyers in the early days of the last century prepared and argued the "great cause."

Mr. Gaston, appreciating the burden which he carried, in arguing for the devisee of Earl Granville, a name cordially detested by the people, and whose ownership of the vast domain involved had occasioned, for more than half a century, endless friction and trouble to the Colony, said:

> "When the circumstances under which I arise to address Your Honors are distinctly considered, it will not be deemed strange that I feel somewhat of embarrassment and confusion—the importance of the cause—the general interest and universal expectation which it has excited, the many new and difficult questions which it opens for solution, might well occasion the most experienced and the most learned advocate to advance to the discussion with diffidence and apprehension. . . . The very boldness of the enterprise inspires a species of courage. Counsel is animated by the consciousness that the duty he is to discharge tho' arduous, is highly honorable, and he is cheered by the conviction that those to whom he addresses himself, have not only acuteness to discern the merits of a cause, but the goodness to overlook the defects of the advocate. The case comes before the Court upon a demurrer to evidence. It must be gratifying to every friend of the exact and impartial administration of justice that, involving, as it does, such important principles and such high interests, it should be thus presented for decision on its plain and naked merits, freed from all disputes about facts and disembarrassed from every cavil of form. As the interests of my clients are concerned, I can not but rejoice that an opportunity is now afforded them of having the merits of their claim

fairly, fully, deliberately and dispassionately considered—so that, even should the decision be ultimately adverse to their wishes, they may rest satisfied that it is the decision of the law. But, as it regards the honor of my native State, I still more rejoice at the course which the cause has taken. Her honor imperiously required that a claim like this should be openly and boldly met—that the determination of it should rest with a tribunal above all suspicion of favor, or prejudice, and whose decision, however it might affect her interests, could leave no stain upon her reputation."

He made, after the "opening," a clear and accurate statement of the facts disclosed by the evidence, concluding:

"From this statement, it appears that, on the 12th of February, 1776, the devisees of Lord Granville had an indisputable title to the land now sued for. Unless, therefore, it can be clearly shown that this title has been legally divested, it must follow that they are yet its owners and have a right to demand the judgment of the Court in their favor."

He proceeds to state the grounds upon which the defendants claim title. (1) That the title of Earl Granville was extinguished by the Revolution. (2) That it was vested in the collective body of the people of North Carolina by the twenty-fifth section of the Bill of Rights. (3) That it had been confiscated. (4) That the devisees of Earl Granville were aliens and incapable of taking and holding lands in this State. (5) That their action was barred by the statute of limitations.

From Judge Cameron's "Argument" it appears that Mr. Gaston fairly and correctly stated defendants' "Contentions." It was on the two first positions—the effect of the Revolution upon the title of Earl Granville, and the language of the proviso to the twenty-fifth section of the Declaration of Rights, that both counsel exhibited the largest range of study and reflection and rested their case. These contentions involved the determination of the character and incidents of the tenure by which Granville held title. Gaston argued that these questions were not to be decided by reference to municipal law, but by "the principles of right reason and natural equity—and, by the sentiments of the most approved and authoritative writers on the subject of universal law, according to all these, no position seems

to me more clearly established than this—that private rights however their enjoyment, may be suspended, are not extinguished by national quarrels, civil wars or revolution of Government."

To this argument Cameron replied that the status of Granville, in respect to the lands held by him, removed him from the protection accorded to private ownership of property. He argued, very forcibly, that by the original Charter, the Lords Proprietors were empowered to, and did in fact, set up a government—by their appointees, made and enforced laws, appointed judges and other officers and maintained and exercised all of the functions of political sovereignty, subject only to their ultimate allegiance to the King. That while Earl Granville had, by his grant to the King in 1744 "parted with the empty and unprofitable insignia of Royalty, though he gave up for himself and his heirs the right of legislation, of life and death, of peace and war, of building forts, garrisons, *etc.*, of regulating trade and religion and of granting titles of nobility, he retained the great, important and substantial right of granting lands to be held of *him and his heirs* and not of the King and his heirs." That he opened entry offices, appointed surveyors and agents to issue grants, *etc.*, concluding:

> "This statement of facts contradicts the idea that Lord Granville's rights were like the rights of other individuals, and proves that, as far as it concerned the property in the soil, the right of disposing of it, and the consequences of tenure under one or the other, the royal and proprietary rights were the same. Both were sovereign in their respective territories. In this situation did the rights of the Crown and Lord Proprietors stand in the year 1776, a year which witnessed the emancipation of a Nation, which gave freedom to millions and will ever be held in sacred remembrance by the votaries of liberty."

From this position he argued that the title of Earl Granville, as that of the King, by virtue of the separation of the Colony from the Crown, was extinguished and vested in the people of the State. That, from the moment that the Declaration of Independence was made, the war between the United States and Great Britain became a public war.

"When the State was dissolved (by which I mean the former established government) a new sovereignty arose. The people, who had been subjects, became rulers, and as they had the supreme control of all within the limits of the State and in fact possessed the only legitimate right to the exercise of sovereignty within those limits; the existence of any other sovereignty within the same limits would be directly incompatible with the first."

To this line of argument, Mr. Gaston replied, insisting that, by the cession of Granville, in the grant of 1744, of all governmental and political authority and power granted to the Lords Proprietors, and the acceptance from the King of the grant for the one-eight part of the soil, his title became subject only to those incidents attaching to the tenure of all others, who held grants from the King. Referring to the grant of 1744, he said:

"It will be found that he retained none of the powers and franchises which had relation to the Government of the Province, none which was inconsistent with the condition of a private subject. In no respect did his devisees differ from the subjects of the King possessing property in this country, except that they held lands to a greater extent and had annexed to their ownership the right of subinfeudation. It will not be alleged that the nature of their right is to be ascertained from the quantum of their property. Does then the last discriminating circumstance require that they should be regarded not as subjects but as sovereigns—their property be viewed not as individual but as national? The only benefit derivable from the power of subinfeudation is the right of escheat."

That the trial and its results had been the subject of popular discussion is shown by Mr. Gaston's observation:

"It will not be urged here, I suppose, as it had been out of doors, that one of the objects of the Revolution was to get rid of the Granville claim. Should it be, it would be sufficient to ask where is the object assigned. The oppression of the British King and Parliament—their exhorbitant pretensions to bind the Colonies in all cases whatever. What would have been the effect had the Granville claimants taken part with America in the contest? Yet the part they should take could not vary the *nature* of their *interest,* nor render it more or *less repugnant* to the principles of the New Government."

Judge Cameron, in reply, said:

> "For the purpose of excepting the plaintiff's case from the operation of these general principles, founded in the law of Nature and of Nations, it has been much insisted on, that the plaintiff's rights are of the nature of individual rights, and do not come within those principles applicable to the case of sovereign rights, and for the purpose of proving this position, it is stated the right of escheat is the only right consequential on tenure under Earl Granville. In my opinion enough has been stated to prove that the Proprietor's rights are not of the nature of individuals but sovereign rights; but the right of escheat proves it."

He proceeds to make an exhaustive examination of the law of escheat as an incident to feudal tenure, *etc.*, concluding with the declaration that if, by the Revolution, the people had not destroyed all claims inconsistent with the free, absolute and unlimited exercise of sovereignty, "in vain, then, have been the labors of the free people of North Carolina. They have pursued the shadow while they have suffered the substance to escape them."

Mr. Gaston, discussing the effect upon the Granville title of the twenty-fifth section of the Declaration of Rights, asserting title to all of the land within the boundaries of the State to be in the people, said:

> "To this general declaration there are some reservations and exceptions of which the only one material to the present discussion is the third. This provides that nothing in the said section contained shall affect the titles, or possessions of individuals holding or claiming under the laws heretofore in force, *etc.* By the declaratory part of this section, say they, the people assume to themselves collectively, their right of property in all the lands within the bounds of the State, not heretofore appropriated and vested in individual citizens in the manner described in the proviso."

The defendants relied upon an opinion rendered by Judge Johnson, of the Court of Conference, in *Faris* v. *Simpson*,[2] holding that the proviso to the twenty-fifth section of the Declaration of Rights saving the title of individuals to whom grants

[2] 1 N. C. 294 (1801).

had been issued by the King or the Lords Proprietors, prior to July 4, 1776, applied only to such individuals as were of the "collective body of the people." Judge Johnson said:

> "The declaratory or enacting part of the clause regards the citizens or body of the people collectively, within the boundaries therein described, and confess no territorial rights, except to them; the saving in the proviso is to secure to individuals of that collective body of the people their separate and individual titles to their lands, but can not, as I apprehend, mean or intend to secure titles to lands, or vest in individuals, not individuals of the collective body of the people of this State, but aliens and foreigners who had never become parties to the compact on which our government was formed, not residing within the limits of its territory."

Judge Taylor, later Chief Justice, did not concur in that opinion, but concurred in the decision upon other grounds. In referring to Judge Johnson, Mr. Gaston said:

> "No one can entertain a stronger affection for the virtues, or a higher reverence for the talents, of that most respectable gentleman, than myself. But so numerous, and to me, such weighty objections oppose themselves to the construction adopted by him of the clause in question, that it is impossible for my mind to acquiesce in it. Its novelty alone is sufficient to excite strong doubts of its correctness."

He proceeds to show that:

> "Innumerable cases have occurred, many soon after the formation of the Bill of Rights, in which this exposition would have been resorted to had it been known. . . . In the celebrated case of *Bayard* v. *Singleton,*[3] decided for the defendant upon another principle, much property was at stake—the first professional characters of the State were concerned as counsel—the arguments were very elaborate and at great length, but we hear no intimation of this construction. Yet, this construction, if correct, would at once have put an end to the claims of the plaintiffs. Is not this sufficient to show that such an exposition was not then thought of? Let it be remembered too that it is sanctioned by the approbation of one Judge only, and expressly denied by another. May it not have arisen from assuming, as certain, what is now to be shown, if possible, that the Granville claim was extinguished and from an inability to discover any other method by which it had been destroyed."

[3] 1 Martin Rep. 48 (N. Car. 1787).

He thereupon proceeded to analyze the twenty-fifth section of the Bill of Rights and the proviso. In respect to the latter he said:

> "It is provided that nothing in said Declaration of Rights contained shall affect the title or possession of individuals *holding* or *claiming* under the laws heretofore in force or grants made by the late King George III or his predecessors or the late Lords Proprietors or any of them. Individuals, unrestricted by any epithet, any modification, must mean individuals of every description. There is nothing that warrants a constructive restriction of the general meaning. There is no argument of inconvenience that requires it. . . . The proviso does not secure those persons in the enjoyment of the land they had formerly held. It declares only that the enacting part of the section shall have no effect upon them either to protect or destroy."

Mr. Gaston discussed, at much length and with force, the construction of the proviso. His conclusion was especially forceful:

> "Let us bring to the view of the Court one more circumstance connected with the exposition of the last section of the Declaration of Rights and I will then no longer detain them on this point of the case. No inconsiderable part of our statute code is made up of Acts of Confiscation enacted during the Revolutionary War. Where was the necessity of these acts, if the construction of our Bill of Rights, asserted by the defendants, be correct? They are without use and without meaning—calculated only to embarrass, perplex and deceive."

He then proceeds to examine the various confiscation laws and to show that they were inconsistent with the construction sought to be placed on the proviso—that if only the lands of those who were members of the collective body of the people were removed from the operation of the general words of the section, there was no necessity for enacting confiscation acts—that the title of all persons not members of the collective body, vested in the State by the operation of the twenty-fifth section, all of the territory within the limits of the State. This argument was, of course, addressed to the question of the sense in which the word "individuals" was used by the framers of the Bill of Rights.

In *Bayard* v. *Singleton*,[4] the court held an act of the legislature unconstitutional and void. It attracted much attention at the time and has been frequently cited. In that case, Iredell, Johnson and Davie appeared for plaintiff—Moore and Nash for defendant—claiming under the confiscation laws. The facts disclosed show that Judge Johnson's opinion in *Faris* v. *Simpson*[5] would have been decisive of that case without regard to the confiscation law. The claimant there was not one of the "individuals" saved by the proviso. This was doubtless Mr. Gaston's reason for saying that the opinion was "novel." Judge Cameron, referring to the language of the twenty-fifth section of the Bill of Rights, said:

> "Wherefore it was declared that all the territory was the right and property of the people. By this declaration all rights and property in the soil, whether belonging to the Crown, to the Lords Proprietors or individuals, vested in the collective body of the people. The property of Lord Granville was divested and he was as completely stripped of all his rights as tho' he had never been cloathed with them. It can not fairly be imagined that Congress intended by the last proviso to save the titles and possessions of any individuals, but those who were parties to the compact. They were delegated by the individuals forming the collective body of the people of North Carolina, for whom they were acquiring sovereignty and its incidents; consequently they could only intend to save the rights of those individuals and none others. If they had done otherwise, they would have exceeded their authority, violated their trust, and acted traitorously to their country by preserving those very titles which were intended to be destroyed. Besides, the rights of Lord Granville had always been looked upon and regarded as sovereign rights, and it is evident were so considered by Congress in contra-distinction to individual titles."

He insisted that it was the titles of individuals of the collective body which were under their care and protection in framing the proviso and not the titles and possession of the Crown and Lords Proprietors.

> "Over the one, they threw the shield of protection; against the other they drew the sword of destruction."

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[4] *Supra*, note 3.

[5] *Supra*, note 2.

Judge Cameron's analysis of the language of the proviso—the construction of the word "individuals," *etc.*, while interesting, is not so convincing as that portion addressed to the evident intention of the framers of the Bill of Rights—read in the light of the history of the contests and controversies which had existed and excited the feelings of the people for many years preceding the Revolution, it was manifestly their purpose to extinguish the title of Lord Granville. Judge Cameron quoted very largely the opinion of Judge Johnson in *Faris* v. *Simpson,*[6] and *Marshall* v. *Lovelass,*[7] and said:

> "Of these opinions it has been said that they are *novel.* . . . I beg leave to remark that Mr. Johnson has been always considered one of the first law characters in this State. He was a member of the profession and occupied a high rank in it, long before the Revolution. He was an early and active agent in the Revolution and a member of some of the first Congresses and Assemblies held under the new government. Of course he was well acquainted with the affairs of it, and with the objects of all the public acts, done under its authority; and a construction placed by him on one of those acts, is more to be relied on, than that by one who was not contemporary with making of those acts and had consequently not the same means of information. No occasion ever called for an exposition of the Bill of Rights until the year 1800. In truth every person, whether in Europe or America, acquiesced in the practical construction put on this section from the year 1776 up to that time and made no question about it. The opinions, therefore, of Mr. Johnson ought not to be suspected or viewed with caution on account of novelty, because they only judicially declare that construction which the section had for twenty-six years uniformly, tho' silently received." [8]

It is doubtless true that, in the opinion and estimation of the people, Earl Granville's title was regarded as a continuation of that of the Lords Proprietors and himself as one of them. It was upon this theory and the exclusion of his title from the proviso to the twenty-fifth section, that defendants relied to

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[6] *Supra,* note 2.

[7] 1 N. Car. 325 (1801).

[8] For Judge Johnson's relation to the Halifax Convention of November, 1776, see McRee's Life of Iredell, Vol. I, p. 335.

sustain their position that Earl Granville's title was divested. Judge Cameron said:

> "The defendants derive their title under the State which has granted the land in fee to them by an Act of Assembly passed the 15th of November, 1777."[9]

He concludes this branch of his argument, saying:

> "From all of which, I conclude that those who had framed the Bill of Rights, and those who were afterwards called on to legislate on it, were of the opinion that either by the *natural* effect of the Revolution, or by the Bill of Rights and Declaration of Independence, the property had been vested in the collective body of the people of North Carolina and that they were entitled to dispose of it in the manner deemed most advantageous to the whole community and that those to whom portions of it might be allotted for the purpose of settlement, and improvement, would enjoy it free and undisturbed."

While Judge Cameron also relied upon the confiscation acts, it is quite clear that he recognized the difficulties which were encountered by the decision of the court in *Faris* v. *Simpson*,[10] that, under the Act of 1777, titles were not divested out of persons coming within its operation without proceedings had in the nature of office found. The record failed to show that any proceedings were had against Earl Granville or that any seizure of his lands was made or any other act done as the statute prescribed prior to the Treaty of 1783. Of course, if Earl Granville's title had not been divested by the twenty-fifth section of the Declaration of Rights and, if the confiscation acts did not, without inquest of office or seizure, *etc.*, operate to divest such title, the Treaty of 1783, and later of 1794, which provided that no future confiscations be made, protected the Granville title and the grant to defendants in November, 1788, conferred no title. On the question of the inability of the devisees of Earl Granville to take the title because of alienage, the depositions showed the death of John, Earl Granville, 1763, leaving Robert his heir who devised to Coventry September, 1772, and died February 12, 1776—hence, at the date upon

[9] The first act establishing offices for receiving entries, *etc.*

[10] *Supra*, note 2.

which title vested, the plaintiffs were not aliens. Judge Cameron did not argue this question nor the statute of limitations, but concluded by saying:

"Neither the counsel nor the Court can derive much assistance in the consideration of this cause from books. It has not its parallel in all the records of history. It is perfectly *sui generis*. It would, therefore, be improper to govern it by rules and principles, devised for, and adapted to cases arising out of different circumstances. It must be determined by the principles and reasons growing out of its own circumstances. It must be decided with a due regard to those sacred and immutable principles of justice which unequivocably pronounce judgment in favor of the freemen of this State. The question, may it please the Court, is interesting and awful. It is no less than whether it shall be put in the power of those attached to the principles and prerogatives of Monarchy, entertaining a mortal hatred for Republican Institutions, after their long acquiescence, to take the lands from those to whom the State has granted it, those educated in the same country and possessing the same political principles; to lay the foundation of discord and dissensions, and put at hazard the liberties of our country. This question, momentous as it is in its nature and consequences, I leave with this Honorable Court, in the hope and confidence that it will be decided faithfully, impartially and without respect to persons."

The record at June Term, 1805, of the Court, states:

"The motion made in the cause at the last Term, to discharge the demurrer to evidence being further argued, it was ordered by His Honor, Judge Potter (His Honor the Chief Justice utterly declining to give an opinion thereon), that the said demurrer thereon be discharged and that a jury be again empannelled to try the issue of fact, joined between the plaintiff and the defendants in this cause. To which said opinion and order, the counsel for the plaintiffs did then and there in open Court except."

The Raleigh Register, June 24, 1805, contains the following notice of the trial and its incidents:

"The Circuit Court for this District adjourned on Friday last. . . . The cause of the Earl Granville's devisees, which has excited so much public expectation in this state, came on to be heard upon the motion made at December Term, to strike out the demurrer to the evidence. And after

argument of counsel, the District Judge delivered his opinion at considerable length, stating the progress of the cause, the ground of the motion, and the reasons for his opinion; and concluded by saying, that the Plaintiff demurred improperly—that the Defendants joined in the demurrer improperly—and that the whole impropriety should be stricken out and an *alias venire facias* awarded. This being the judgment of the Court, the cause will of course be referred to a jury again; and it is believed, will be tried at the next term. The continuance at this term was granted at the instance of the Plaintiff's counsel, who were not prepared for an argument to the jury.

"The Chief Justice gave no opinion upon the motion, nor does he intend to deliver one on the main question. He stated from the bench his reasons for thus declining, saying, that at a former term he enquired of the counsel if this case depended upon a construction of the treaty of peace; that if it did, he should give no opinion, because he had formed an opinion upon that subject so firmly, that he did not believe he could change it; and as that opinion was formed when he was very deeply interested (alluding to the cause of Lord Fairfax in Virginia) he should feel much delicacy in deciding the present question; but upon being informed that the treaty of peace would make no part of the case, he felt himself freed from that delicacy and intended to deliver his opinion. It seemed, however, that upon the argument, the defence assumed the principle of alienage, thereby involving the case with the treaty of peace, and made that question an important point. The only part of the case on which he entertained any doubt was the confiscation laws; and as he could not satisfy himself that the plaintiff was included in those laws, he could not consistently with his duty and the delicacy he felt, give an opinion in the cause."

At the December Term, 1805, a jury was empannelled and, under the instruction of Judge Potter, returned a verdict for the defendants. A bill of exceptions filed and ordered to be made a part of the record. Thus ended, in the Circuit Court, the trial of this interesting and important cause.

Expressions in Mr. Gaston's argument, evidently prepared before the trial, indicate that he expected Chief Justice Marshall to preside with Judge Potter. Some interesting side lights are thrown upon the subject by the letters of Mr. London. He wrote Gaston, July 8, 1805, referring to the "Granville causes," saying:

"I must own the turn this business has taken occasioned me some chagrin and disappointment; and tho' not altogether satisfactory, yet the favorable sentiments of Judge Marshall encourage me to hope that we shall finally succeed; at the same time you must permit me to observe that I think the Judge's reasons for withdrawing from the cause partakes more of political acquiescence than the dignified, official independence we had a right to expect from his character. He said enough to convince our opponents he was unfavorable to their construction of the law and, therefore, should not have permitted incorrect principles to harass our clients and create expensive delays. Mr. Marshall had certainly no interest in our cause, he ought to have governed the proceedings of a Court over which he presided, according to such opinion—it has very much the appearance of shirking to popular impressions."

After expressing approval of the course pursued by his counsel in taking an exception to the ruling of Judge Potter on the demurrer, Mr. London says that he wishes them, on the trial, to insist on the Judge instructing the jury on the law of the case and be prepared to apply for a writ of error.

"This is altogether of a professional nature and can not be in better hands than yours and therefore I rest in full confidence that every exertion will be made to support our client's claim and obtain that justice that an honorable and independent judiciary can dispense—it is no doubt much in our favor what has already dropt from the Chief Justice."

That, notwithstanding the result of the trial, much apprehension was felt as to the final result in the Supreme Court, is indicated by Governor Stone's message to the legislature of 1809, in which he said:

"The extensive claim of the Earl of Granville's heirs for a large portion of the territory of our State, now prosecuting in the Supreme Court of the United States, is a subject in which the honor and interest of the State are greatly concerned. That becoming respect for her own dignity, which has hitherto prevented the State from interfering and employing agents and councillors to advocate and support the course which she has taken, will probably convince her of the importance of making early provision to meet the justice of the claim of her citizens for remuneration in case of a decision against the sufficiency of the title derived from her-

self. And a possibility that a decision may be made against the sufficiency of this title, when it is generally understood that a greatly and deservedly distinguished member of that Court, has already formed an unfavorable opinion, will probably enforce the consideration that it is proper to make some eventual provision, by which the purchasers from the State, and those holding under that purchase, may have justice done them."

Nathaniel Allen, one of the defendants, in his will, executed November 11, 1805, authorized his executors to make such compromise and adjustment, as they think proper, of the suit "with the heirs or devisees of Earl Granville, so as to link their claim with my estate." I learn from a lawyer of large and accurate information in eastern Carolina that a similar provision is to be found in many wills executed at, or about, that time. While the record does not show upon which of the several grounds relied upon by the defendants, Judge Potter based his opinion discharging the demurrer and at the next term, instructing the jury to return a verdict for the defendants, a letter from Mr. London bearing date April 19, 1806, throws light upon the subject. He writes:

"I feel much chagrin that we are put to so much trouble and expense in this business, and which I fear is in great degree to be attributed to the Chief Justice's delivery, for tho' Mr. Potter's opinion might not have been different from the one he gave, yet I think more caution and hesitation would have taken place in the minds of the jury and probably afforded us the means of trying the pulses of another—certainly the Judge's construction of the deed of 1744 is a very hasty one—as to what he says on the application of the Declaration of Rights as an extinguishment of the Granville Title, he has at least the merit, if incorrect, of not being singular."[11]

The criticism of Judge Marshall, by Mr. London, was not shared in, nor approved by Mr. Gaston—his correspondence with the Chief Justice, many years later, evince the highest regard for him and his character. The cause was, by writ of error, removed into the Supreme Court, but Mr. Gaston declined

[11] An evident reference to Judge Johnson's opinion.

to follow it. Upon his advice, Mr. Phillip Barton Key, who was retained to argue the cause for the plaintiff, wrote to Mr. London, June 22, 1807:

> "My own opinion is in favor of the claim on general principles, nor do I see anything in the State Constitution or laws to defeat it—construing them literally and to promote the object they intend. Our greatest apprehensions result from a narrow and contracted policy, at once illiberal and unworthy—strong prejudices, I know, are excited—very difficult to be overcome, but to which our Supreme Court is less liable than any other of our Institutions; before them I am not without strong hopes of success."

And on January 4, 1808, he wrote:

> "My own opinion is most decided for a continuance of the case, if the Court, and our adversaries will consent to it—the present moment, in all points of view, is most inauspicious, as you will more readily perceive, by the measures of the embargo, so fatal to our interests and so hostile in its consequences to England. I have unlimited confidence in our Judiciary, but the storm that is gathering round them is alarming. I shall be prepared for trial if one is froced on, but my opinion is for delay. It would give me pleasure to see Mr. Gaston here."

Mr. London strongly urged Mr. Gaston to assist in arguing the case in the Supreme Court. He says:

> "I should repeat my solicitation for your aid. No pecuniary consideration, you may rest assured, should stand as competition in the way."

He closes this, his last letter, found among the records, by saying:

> "I have been severely handled by the influenza."

Mr. London expresses "much chagrin," and was evidently "much mortified" at the turn the "Granville causes" took. He adhered to the opinion that Judge Marshall's "withdrawal from the case" was not based upon satisfactory reasons. As was his custom, Mr. Gaston endorsed each of the letters "Ansd." I have not been able to find any of his letters to Mr. London. A careful examination of Judge Gaston's letters, from 1791 until

his death, 1844, fails to disclose any reference to the "Granville causes." He was a member of the General Assembly, and Speaker, at the Session of 1808, and a member of Congress, from 1813 to 1817. The writ of error was dismissed February 4, 1817. It is to be regretted that a cause involving such vast interests and presenting so many novel and interesting questions, should have terminated without, so far as can be found, any judicial expression, other than the order of Judge Potter discharging the demurrer and giving a peremptory instruction to the jury.

In an editorial note to an article in the University Magazine, May, 1861, it is said that Judge Potter published his opinion. It is not in the records of the Court at Raleigh. By a paper, unsigned, and without date, found in the "Swain Collection," enclosed in a letter from Honorable M. King, of Charleston, S. C., to Judge Gaston, December 17, 1842, "received by the Consul at that place, through Sir John Barrow, Secretary of the Navy," it appears that, in 1783 a petition was presented by the claimants to the Commissioners appointed by Act of Parliament for enquiring into the losses sustained by Loyalists in America. They awarded a large sum for quit rents, but "considered that they were not at liberty to take the loss of the fee simple into consideration, but referred Lord Carteret's agent to the Provision of the Treaty of Peace." The paper, which appears to be a "Memorial," states that, at the trial of the case,

> "so great was the excitement that the Judges were glad to escape from the fury of the populace. . . . It has been frequently represented to the agents of Lord Carterett that the difficulty did not arise from any invalidity of title or any question of Lord Carterett's exception from the saving clauses in the Acts of Confiscation, inasmuch as it was not contended that he or his ancestors had borne arms against the United States, but the chief impediment arose from the vast extent of territory embracing, as it does, 69 miles in breadth from the Atlantic to the Mississippi across North Carolina and Tennessee, lying on the Northland, adjoining Virginia. . . . He is deterred from continuance of the prosecution of his claim (1) Because of the proved impossibility of obtaining a trial in a country in which the whole mass of the population are not only interested in the resist-

ance of this claim, but have exhibited their determination to prevent its legal investigation. (2) Because of the impossibility of carrying any verdict of ejectment into effect without a large army."

He says that he recognizes that

"morally the possessors who, by cultivation, have brought the land into a profitable condition have the right to reap the produce of their labor and so have established a title stronger in justice than the legal right to the fee of the land would present."

He adds that, as to the uncultivated lands sold by the State "he contends that he has a reasonable claim upon the State for the proceeds of that sale." It is further said that "in 1833 the then claimant represented his case to the American Minister, resident in London, but obtained no satisfactory answer." In conclusion, he proposes:

"either that a portion of waste land should be set apart and defined as his property and possession, given and granted to him or his agents by the Government, or that a sum of money should be paid to him for the surrender of his title to the whole."

This paper is interesting as presenting the claimant's point of view and his last appeal for recognition of the claims of his ancestor.

While there were other questions—statute of limitations, *etc.*, upon which the case may have been decided, it is evident that counsel for both parties recognized the fact that the record, being argued, was a "test case" and that they sought to have a decision upon grounds which would either establish or destroy the Granville title. In the editorial note referred to, it is said:

"The intent and effect of the last section of the Declaration of Rights . . . was to confiscate the title of Earl Granville."

The House of Commons, at the Session of May, 1784, rejected a bill to repeal all laws inconsistent with the provisions of the Treaty. It may be that this was caused by fear that in

doing so, the Granville title might possibly be revived or the State's title affected. The people of North Carolina, as shown by a number of incidents, were very slow to surrender rights to, or confer power upon, the federal government. The Assembly refused to pass an act requiring the State officers, including its members, to take an oath to support the Constitution. The judges refused to obey a writ of *certiorari* issued by the Circuit Court and the Assembly commended their action.

How far the possibility of endangering the validity of legislation regarding the Granville title, contributed to this state of mind, is an interesting inquiry. That such apprehension was not without foundation is shown by the decision of the United States Supreme Court, a few years later, in *Fairfax Devisees* v. *Hunter*.[12] The North Carolina judges had held in several cases that, under what Judge Taylor called "our system" of confiscation laws, title of owners of land coming with their provisions was not divested until office found or some proceeding equivalent thereto. Neither Earl Granville, nor his devisees, had been named in any of the confiscation laws. No action had been taken in regard to the Granville lands which was equivalent to office found other than the issuing of grants for portions of them, under the entry laws. This was held, in *Fairfax* v. *Hunter*,[13] not equivalent to office found. It is true that in *Smith* v. *Maryland*,[14] it was held that the Maryland act, by its express terms, operated to divest the title out of the owner at whom it was aimed, without any procedure. Our judges held otherwise.

It is manifest that defendants would have encountered serious difficulty if compelled to defend their title upon the confiscation acts. Judge Marshall evidently thought the question doubtful. It therefore seems that the ground upon which they successfully resisted the claim of the devisee of Earl Granville was the limitation placed by Judge Johnson in *Faris* v. *Simpson*,[15] upon the third proviso, to the twenty-fifth section of the

[12] 7 Cranch, 603 (U. S. 1813).
[13] *Supra*, note 11.
[14] 6 Cranch, 286 (U. S. 1810).
[15] *Supra*, note 2.

Bill of Rights. Upon his construction of the proviso, limiting its language to "individuals" who were "members of the collective body of the people of North Carolina," the title to land of immense value, comprising thirteen counties, lying north of the line beginning at a "cedar stake set upon the sea side and as far westwardly as the original grant," depended. Of necessity, and probably, happily, we can only conjecture the result of the decision of the Supreme Court. That court may have followed the construction placed by Judge Johnson upon the proviso as it appears that Judge Potter did.

However this may have been, it was fortunate for the welfare of the people of this State that the Granville title was extinguished. It rested upon no other foundation than the fiction that, by right of discovery the King became the lord of the soil with the right to bestow it upon his favorites according to his own caprice. The Lords Proprietors either neglected or abused the munificent gift. The statesmen who framed the Declaration of Rights and Constitution of the State, with the aid of Judge Johnson, solved the problem with which they were confronted, wisely and well. Apprehending that the case would be decided adversely to the defendants, Governor Stone, for the purpose of providing a fund with which to compensate those who had taken grants from the State, said:

> "And when the manner in which the territory has been acquired is considered; and that it has been reclaimed from a wilderness and rendered productive and valuable by the labor of our citizens, the benefit of all which, if the validity of the State title is decided against, will be transferred to persons alien and hostile to our laws and government, a more convenient source from whence to obtain this fund, or one from which it may with more justice be derived, will not readily suggest itself, than a tax upon the land, themselves, in the hands of the Earl of Granville's heirs, after possession shall have been recovered—besides and beyond the tax for the ordinary purposes of government."

That portion of the lands included within the boundary of the Granville grant, within this State, is now the home of more than a million of happy, prosperous people, working out the problems of the twentieth century, with wisdom and courage.

My sole purpose in making a study of the records of this interesting case and writing this sketch is to gratify a desire to understand by what means the title to the Granville lands was divested and how they were saved to the people of the State who, as said by Governor Stone, "reclaimed them from a wilderness and rendered them productive and valuable by their labor." While a successful prosecution of the writ of error would not have resulted in the ejectment of the thousands of persons who held under State grants, it would have imposed upon the people of the State a heavy burden and involved many in vexatious and expensive litigation. It is probable that the final chapter in the history of the "Granville Causes" has not and will never be written. Why the parties permitted the writ of error to remain on the docket of the United States Supreme Court for more than ten years without an effort to bring it to a hearing, is not easy to understand. The policy of inaction resulted well for the State and her grantees.

Henry G. Connor.

Wilson, North Carolina.